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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

v.

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

BRIEF IN OPPOSITION TO PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions

This is a petition by a stevedore from a decision of the Court of Appeals for the Second Circuit reversing and directing judgment n.o.v. in favor of the shipowner against the stevedore upon retrial of a third-party action for indemnity.

The original trial of this action resulted in a verdict in favor of the injured longshoreman plaintiff against the shipowner and in favor of the third-party defendant-stevedore against the shipowner on the shipowner's claim for indemnity. On appeal to the Court of Appeals for the Second Circuit, both verdicts were reversed and a new trial

of the entire case was directed. The opinion of the Court of Appeals on that appeal is reported officially at 346 F. 2d 481 and is printed in the Appendix to the Petition herein.

Upon petitions for certiorari filed both by plaintiff and third-party defendant-stevedore, and a cross petition by third-party plaintiff-shipowner, this Court, in a *per curiam* opinion, reinstated the verdict in favor of the plaintiff but denied the petition for certiorari of the stevedore and the cross petition of the shipowner. The opinion of this Court thereon is reported at 382 U. S. 283. A petition for rehearing of the stevedore's certiorari petition was denied, 382 U. S. 1030, and a subsequent motion of the stevedore for leave to file a second petition for rehearing was also denied, 384 U. S. 994.

The shipowner satisfied plaintiff's judgment on February 9, 1966 and thereupon moved in the Court of Appeals for recall of the mandate of that Court insofar as it directed a new trial of the third-party complaint, to pass upon the question presented on the shipowner's original appeal that it was entitled to judgment of indemnity as a matter of law. The motion was denied on March 1, 1966 without opinion. This motion, however, was not a motion, as stated by Petitioner, for judgment as a matter of law, but merely a motion to recall the mandate so that the Court of Appeals might consider the question.

A subsequent motion by the shipowner for summary judgment on the third-party claim was denied by the District Court in an opinion which is unreported but which is printed in the Appendix to the Petition.

The opinion of the District Court denying shipowner's post-trial motion for judgment n.o.v. or in the alternative for a new trial is reported at 279 F. Supp. 635 and is also printed in the Appendix.

The opinion of the Court of Appeals setting aside the judgment and directing judgment in favor of the ship-

owner on its n.o.v. motion is reported at 392 F. 2d 763 and is also printed in the Appendix. The denial of the subsequent petition of the stevedore in the Court of Appeals for rehearing or rehearing *in banc* is unreported, but the order thereon is printed in the Appendix to the petition herein.

Jurisdiction

It is not disputed that jurisdiction exists under 28 U.S.C. Section 1254 (1). However, the petition presents no new or novel question but reiterates the same arguments and urges the same questions as were originally presented in the petition of the stevedore for certiorari to the first decision of the Court of Appeals herein, and in its petition for rehearing and motion for leave to file a second petition for rehearing.

The petition, it is submitted, fails to set forth sufficient reason for the granting of certiorari under revised Rule 19 of this Court.

The Questions Presented

There is no constitutional issue under the Seventh Amendment involved. All that is really involved is the question; where a longshoreman is injured by carbon monoxide fumes exhausted from hilos employed by a stevedore in performing loading operations aboard a vessel, and the stevedore has in its own possession and under its control means for detecting the carbon monoxide content of the atmosphere and keeping the atmosphere in a safe condition for work, can the stevedore be relieved of the performance of its warranty of workmanlike service by belatedly requesting through subordinate employees that a vessel's forced ventilation system be put into operation after the longshoremen began to complain of the density of fumes within the hold and within less than 15 minutes

of the happening of the injury. This question has twice been answered by the United States Court of Appeals for the Second Circuit in the negative, and this Court has already, on three applications of the Petitioner herein, refused to review the Court of Appeals decision.

Restatement of the Case

Petitioner seeks to state the case involved as if all relevant events occurred between 11 a.m. and a few minutes thereafter on the morning upon which plaintiff sustained his injury, and thus to eliminate from the case all events preceding that moment in time, as if the hazard to the plaintiff for which the shipowner has been held liable suddenly came into being.

The facts upon which the shipowner has been held liable to the plaintiff are succinctly set forth in the first decision of the Court of Appeals herein (346 F. 2d at pp. 482-483, Appendix to Petition p. 4a) as follows:

> "Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the SCHIEDYK. From 8:00 A.M. to 10:45 A.M. on the day of plaintiff's injury a gasoline powered hilo owned by I.T.O. was working in this hold. About 10:45 A.M. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I.T.O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that at about 10 or 15 minutes after the second gang entered the hold, men complained of fumes

from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed sometime between 11:15 and 11:30 A.M., the blowers had not been turned on and the men left the hatch."

Upon retrial, the shipowner introduced into evidence the complete record of the prior trial including the stenographer's minutes to establish the basis upon which it had been held liable to the plaintiff and read into the record from testimony taken before trial of the stevedore's pier superintendent, Joseph Jerkovich, to evidence that the stevedore was in complete control, and had complete supervision, of all operations involved in the loading of the cargo on board the shipowner's vessel (Appellant's Appendix, 46a-47a, 49a-51a, 53a-60a, 66a). This testimony also established that the hilos, one of which had been placed first in the lower hold and the other later in the after half of the 'tween deck of the vessel, were owned and controlled by the stevedore, and that all of the persons engaged in the operation of loading the vessel including the longshoremen, the hilo drivers and all supervisory personnel were employees of the stevedore (Appellant's Appendix 47a, 49a-52a, 136a). It established also that the stevedore owned and controlled a large number of portable blowers which were kept at the pier where the vessel was being loaded and that when hilos were being used in the holds of vessels, these portable blowers were supposed to be put on board to exhaust fumes from the holds; and also that there was maintained in the office of the stevedore's superintendent instruments for measuring the carbon monoxide content of the atmosphere in the holds, which the stevedore's supervisory employees, specifically the ship's superintendents who were in charge

of the stevedore's operations on the vessels, had been instructed to use where hilos were being employed, and if the content in the atmosphere required, to put additional blowers into operation (Appellant's Appendix 54a-57a, 59a, 60a). There was no dispute as to this evidence.

The third-party defendant-stevedore on its case read from the deposition taken before trial of the vessel's chief officer and called as a witness one Joseph P. Van Daalen, a shoreside employee of the shipowner. The substance of all of this testimony was merely that the ship was equipped with a cargocaire system which could have been used to clear the atmosphere in the holds and, although primarily designed for the care of cargo at sea, was sometimes used when hilos operated in the holds, and that neither of them had observed any accumulation of smoke in the hold during the morning or had heard of any complaints from the longshoremen (Appellant's Appendix 95a, 101a, 104a, 107a-108a, 111a, 114a, 141a, 142a). The only other testimony introduced by the third-party defendant was that of Rudolph Curko, the working hatch boss of the gang which put the second hilo in operation in the after half of the 'tween deck at 10:45 a.m. He testified as to the request to the mate to put the ship's blowers in operation at approximately 11 a.m. after complaints were made by the men of smoke and fumes in the hold (Appellant's Appendix 129a-131a, 133a-136a). This testimony was substantially identical with that given by him at the first trial. This is all the testimony that was introduced at the retrial, and there was no dispute as to any of it, except for some testimony given by Jerkovich on his pretrial deposition as an adverse party, which the third-party defendant was allowed to read over objection by counsel for the shipowner, to the effect that at some uncertain time during the morning of the accident, he saw blowers in use at the No. 2 hold. This testimony had been excluded at the first trial and was inconsistent with the uniform testimony at that trial upon which the shipowner had been held liable to the plaintiff

as noted by the Court of Appeals in its decision below (392 F. 2d at p. 764-5, Appendix to Petition, 31a).

It is not true as said by Petitioner (p. 6 of the petition) that there was undisputed testimony that up until approximately 11 a.m. the working conditions in the hold were good. The only testimony was to the effect that there was no observable smoke in the hold prior to 10:45 when the second hilo was put into operation. The injury producing element here was not smoke but carbon monoxide whose pernicious characteristic is that it is both colorless and odorless.

It is a gross misstatement of the shipowner's position (as stated in the Petition at p. 8) that the basic argument advanced by the shipowner at the trial was that the stevedore breached its implied warranty of workmanlike service in complying with the mate's orders and continuing to work in reliance on the mate's assurances that he would turn on the ship's blowers. *Per contra,* it is, and it has always been the shipowner's contention, that the stevedore cannot be exonerated from the breach of its implied warranty in creating an unsafe condition in the hold by the use of its hilos and in continuing to work its men when it knew or should have known that conditions were unsafe without taking any of the means available to it to keep conditions in the hold safe, by the belated request to the mate to put on the ship's blowers only after its workmen had begun to complain of the smoke and fumes in the hold, in reliance upon the shipowner to do what was its own prime duty.

Argument

I.

There is no Seventh Amendment Constitutional question involved in this case.

It has long been settled by this Court that the Federal Courts have not only the power but the duty to direct judg-

ment in favor of one party or the other where the facts are undisputed and there are no conflicting inferences, *Herron* v. *Southern P. Co.*, 283 U. S. 91.

In that case, this Court held that a provision of a State Constitution providing that the defense of contributory negligence or of assumption of risk shall in all cases be a question of fact, and shall at all times be left to the jury, could not impair the power of a Federal Court to direct a verdict in favor of the defendant where plaintiff's contributory negligence was established as a matter of law, saying that in such an instance "The judge has the right and duty to direct a verdict for the defendant", citing a host of prior cases.

In *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, the Trial Court had reserved decision on a motion for directed verdict and subsequently denied the motion. Upon appeal to the Circuit Court of Appeals, that Court held the evidence insufficient to sustain the verdict and reversed the judgment with a direction for a new trial. This Court granted certiorari to pass upon the question whether under the Seventh Amendment, the Circuit Court had the power and duty because of insufficiency of the evidence to direct judgment instead of remanding for a new trial, and specifically held that the Seventh Amendment preserved the common law powers of an Appellate Court to set aside a verdict not supported in law and required the Court to direct a verdict where required by law instead of remanding for a new trial.

In *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, this Court pointed out that Rule 50 (b) of the Federal Rules of Civil Procedure was enacted in conformity with the Seventh Amendment and preserved "the right of either party to have a question of law reserved upon the decision of which the Court might enter judgment to one party in spite of verdict in favor of the other" and merely rendered

unnecessary "a request for reservation of a question of law" (p. 250).

As recently as 1960 in a F.E.L.A. case, this Court, *per curiam*, reversed a decision of the Court of Appeals affirming a judgment in favor of a plaintiff against a defendant, and directed judgment on defendant's motion for a directed verdict and for judgment n.o.v. because of insufficiency of the proof to establish defendant's negligence, *New York, N.H. & H.R. Co.* v. *Henagan*, 364 U. S. 441.

In *Mosley* v. *Cia. Mar. Adra, S.A.*, 362 F. 2d 118, the Court of Appeals for the Second Circuit affirmed a judgment n.o.v. in favor of the shipowner against the stevedore who "furnished and rigged" the injury producing instrumentality, "and controlled all other relevant aspects of the loading", upon the ground that "the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service" (*id.* p. 122). Certiorari was sought in that case upon the same ground as here advanced that the judgment n.o.v. deprived the stevedore of the Seventh Amendment guarantee of jury trial. This Court denied certiorari *sub nom., Lipsett Steel Products* v. *Samuel Mosley et al*, 385 U. S. 933.

The Court of Appeals in reversing the judgment in favor of the stevedore in the case at bar, did not attempt to reweigh the evidence, or to substitute its conclusions or inferences from the facts for those of the jury, as suggested by Petitioner. As is quite apparent from the Opinion, the decision of the Court of Appeals is based specifically upon the ground that under the evidence and under the law, no jury question was presented and the shipowner was entitled to judgment against the stevedore as a matter of law (Appendix to Petition, 30a-31a).

Petitioner appears to argue that since the Court of Appeals did not direct judgment in favor of the shipowner on the first appeal but remanded the third-party case for

a new trial, it thereby held that as a matter of law there was a jury determinable issue as between the shipowner and the stevedore. In so arguing, Petitioner fails to recognize that since the Court of Appeals on the first appeal had also remanded the plaintiff's case against the shipowner for a new trial because of error in the charge, it necessarily had to remand the third-party action for retrial since the question of the shipowner's right to indemnity could only be determined within the context of any liability imposed upon the shipowner on retrial of plaintiff's case. *Washington Gaslight Co.* v. *District of Columbia,* 161 U. S. 316, 331 *et seq.; Fatovic* v. *Nederlandsche-Ameridaansche Stoomvaart,* 275 F. 2d 188; *Mosley* v. *Cia. Mar. Adra, S. A.,* 314 F. 2d 223, cert. den. 375 U. S. 829; *Caputo* v. *U. S. Lines Company,* 311 F. 2d 413, cert. den. *sub nom., Imparato Stevedoring Corp.* v. *United States Lines Company,* 374 U. S. 833.

On the first appeal, the Court of Appeals had held erroneous (346 F. 2d 484) the charge of the Trial Court to the jury to the effect that if the jury should find that complaints were made to the ship's officer as soon as the dangerous condition was known or should reasonably have been known by the stevedore, and that the ship's officer directed the longshoremen to continue working, with the added assurance that the dangerous condition would be promptly eliminated, then the shipowner is not entitled to recover indemnity (Appellant's Appendix, 230a). Although this Court granted the plaintiff's petition for certiorari and reinstated the verdict in favor of the plaintiff, it denied the stevedore's petition for certiorari, 382 U. S. 283. Subsequent petitions by the stevedore for rehearing of its petition for certiorari were also denied by this Court, 382 U. S. 1030; 384 U. S. 994. Petitioner is now again seeking a review on certiorari of a question which this Court has already three times refused to review.

There was no new or additional evidence on this phase of the case (Opinion below, Petitioner's Appendix, 32a)

The special interrogatories addressed by the Court to the jury on the retrial related solely to these complaints to the ship's officer and his response thereto (Appendix to Appellant's Brief, 235a). The issue as to the effect thereof had already been precluded by the Court of Appeals' decision on the first appeal, certiorari to which has been denied by this Court. On the general issue as to the stevedore's breach of warranty of workmanlike service, only a general verdict was taken. Petitioner's heavy reliance upon *Atlantic and Gulf Stevedores* v. *Ellerman Lines*, 369 U. S. 355, is entirely misplaced. In that case this Court did not hold that under no circumstances could a judgment of directed verdict be given in favor of the shipowner against the stevedore. There were two bases of liability upon which the ship, under the charge, might have been held at fault either for unseaworthiness or negligence, in either of which instance this Court indicated that the Circuit Court's decision granting a directed verdict in favor of the shipowner against the stevedore would have been justified. It was only the third possible ground of liability for unseaworthiness, namely, the defective bands which secured the bales of burlap, a condition not known to the stevedore, which this Court held could reconcile the jury's verdicts in favor of the plaintiff against the shipowner, and against the shipowner in favor of the stevedore. Here there is no question of reconciling the jury's verdict.

Equally misplaced is Petitioner's reliance upon *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563. In that case after the rendition by the jury of a verdict in favor of the injured plaintiff against the shipowner, the District Court had directed a verdict in favor of the third-party defendant stevedore against the shipowner on the issue of indemnity upon the ground that the jury's verdict against the shipowner precluded a verdict in favor of the shipowner against the stevedore. The plaintiff had been injured by the falling of a timber from a winch shelter which had been erected on the vessel in New York and

had been made available by the shipowner to the stevedore during unloading of the vessel in Boston. This Court merely held that the jury's finding of negligence on the part of the shipowner did not preclude the shipowner from having indemnity from the stevedore, since under one theory upon which the shipowner could have been held at fault under the Court's charge, there was a fact issue on the shipowner's right to indemnity under appropriate instructions. That is not the case here.

All that is involved here is whether under the undisputed evidence in this case any verdict could properly have been brought in by a jury other than one in favor of the shipowner since, as stated by the Court of Appeals in its opinion herein, the stevedore not only knew of the dangerous condition but had actually created it, and had means available to ascertain the condition and to correct it, but used neither and allowed conditions to become unsafe while it continued to work the men.

Indemnity must be determined upon the bases upon which the shipowner was originally held liable to the plaintiff, and the verdict against the shipowner on the first trial is binding upon the stevedore as well as the shipowner to the full extent of all facts necessarily found by the jury upon which the shipowner's liability depended, *Washington Gaslight Co.* v. *District of Columbia, supra; Caputo* v. *United States Lines Company, supra.*

The bases upon which the jury was allowed to bring in a verdict against the shipowner at the first trial were: 1) unseaworthiness of the hold, because the accumulation of noxious fumes from the exhaust of the hilos working in the hold rendered the hold unfit and unsafe; 2) that the shipowner was under an obligation to provide the plaintiff with a safe place to work and, accordingly, would be liable in negligence if the shipowner either knew or as "a reasonably prudent person should have known that an enclosed work space was unsafe after a substantial work period with

gasoline powered engines in the absence of ventilation'' (Appellant's Appendix, 229a). The Court of Appeals on the first appeal had held that this was error (Appendix to Petition, 5a), but this Court, on the petition for certiorari of plaintiff, summarily reversed and directed the reinstatement of plaintiff's verdict, 382 U. S. 283.

Obviously, if the shipowner was chargeable with constructive knowledge under the charge in the principal case, so also was the stevedore who was in charge of the work, who owned the hilos, placed them in the hold, controlled the men, had means for ascertaining the conditions of the atmosphere which its supervisory personnel were charged by it with employing for such purpose, and who also had the means for clearing the atmosphere, which means the supervisory employees were also charged by it to employ (Cf. *Washington Gaslight Co.* v. *District of Columbia, supra*). Under such circumstances, having created the condition and continued to work its men without correction of the condition, the stevedore as a matter of law could not escape liability under the principles of maritime indemnity laid down by the decisions of this Court from *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Co.*, 350 U. S. 124 (1955) through *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964), as said by the Court below in its opinion (Appendix to Petition, 32a-33a).

In *Italia Societa,* reviewing its earlier decisions, this Court held that the stevedore is liable for indemnity even though it has no knowledge of the unsafe condition if it is in fact created by the tools and appliances which it, the stevedore, brings aboard and that the stevedore's liability, being in warranty, does not depend upon negligence concepts of the exercise of reasonable care. Thus, there could be no legal basis upon which a jury could find that the stevedore had not breached its warranty of workmanlike performance.

The verdict of the jury in favor of the stevedore on the retrial was precipitated by unfortunate errors of the District Court: 1) in improperly admitting into evidence Section 9.93 of the Safety and Health Regulations for Longshoring (29 C.F.R. Sec. 9.1 *et seq.*, renumbered as of January 1, 1964, 1504.1 *et seq.*),* which are inapplicable as to shipowners (Petitioner's Appendix, 6a, 346 F. 2d 484, cert. granted, 382 U. S. 283), and in charging that the jury could take these regulations into consideration as between the shipowner and stevedore (Appellant's Appendix, 182a); 2) in admitting into evidence the contract between the shipowner and the stevedore and in charging the jury that they could take into consideration a provision of that contract requiring the stevedore to advise the shipowner immediately of any hazardous conditions which require remedy (189a), as if this could affect the stevedore's law-implied warranty (Cf. *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 336 F. 2d 124 (CA 9, 1964), cert. den. 379 U. S. 973), which was the import given to the contract in defendant-stevedore's summation (Appellant's Appendix, 172a); and 3) in charging the jury that if they found the facts to be as testified to by Curko, they must bring in a verdict for the defendant-stevedore (Appellant's Appendix, 192a), which was contrary to the law of the case as established on the first appeal (346 F. 2d 481, 484; cert. den. 382 U. S. 283).

To all of these errors exception was taken at the trial and urged on the appeal to the Court below. But these

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*Section 9.93

VENTILATION AND ATMOSPHERIC CONDITIONS

(a) When internal combustion engines exhaust into the hold or intermediate deck, and neither natural ventilation nor the ship's ventilating system is adequate to keep the carbon monoxide content of the atmosphere in the hold or intermediate deck below 100 parts per million, the employer shall use blowers sufficient in size and number and so arranged as to do so. The intakes of blowers shall be adequately guarded by screens.

errors, of course, became moot by reason of the decision of the Court of Appeals, properly so, that the verdict could not stand as being contrary to law.

II.

The decision below is not in conflict either with decisions of this Court, or of other Courts of Appeal.

The contention of conflict with the decisions of this Court in *Weyerhaeuser SS Co.* v. *Nacirema Operating Co.,* 355 U. S. 563 and *Atlantic and Gulf Stevedore* v. *Ellerman Lines,* 369 U. S. 355 and with the decisions of the Courts of Appeals in other Circuits denying indemnity in particular instances, was the subject of the stevedore's petition for certiorari from the first decision of the Court of Appeals in this case, and was therein extensively argued both by the Petitioner and the shipowner. That petition was denied by this Court (382 U. S. 283). Subsequent to the granting by this Court of certiorari to the plaintiff in this case and the reinstatement of plaintiff's judgment, the Petitioner moved for rehearing of the order denying its petition for a writ of certiorari upon the ground that, having obtained a jury verdict in its favor on the original trial, the petition for certiorari from the reversal by the Court of Appeals of the judgment in its favor should be granted by this Court for the reasons contained in its original petition. This petition was also denied (382 U. S. 1030).

When a petition for writ of certiorari to the Court of Appeals for the Fifth Circuit was filed in this Court in the case of *Waterman Steamship Corporation* v. *David,* 353 F. 2d 660 (1965), a motion was made by the Petitioner herein for leave to file a second petition for rehearing of the order of this Court denying its original petition herein upon the ground of conflict between the decision of the Fifth Circuit in the *Waterman* case and the decision

of the Court of Appeals for the Second Circuit herein. This motion was also denied by this Court (384 U. S. 994). This is now the fourth attempt to have this Court review the decision of the Court of Appeals herein as to what constitutes indemnity precluding conduct upon the ground of conflict with the decisions of this Court in *Weyerhaeuser* and *Atlantic and Gulf* and the decisions of the Courts of Appeal of the other circuits. The subject would seem to have been pretty well exhausted by this time. This Court's decision in *Weyerhaeuser* makes it eminently clear that the only type of conduct which can preclude indemnity is such as prevents or hinders the performance by the stevedore of his warranty of workmanlike service. Thus, in that case, in holding that the shipowner would be entitled to indemnity even though the shipowner was, itself, negligent and had provided the unsafe equipment out of which the injury arose unless it was chargeable with conduct "sufficient to preclude recovery" this Court cited in footnote 6 at 355 U. S. page 567, *Corbin on Contracts,* Sections 571, 947 and 1264, and *Restatement of Contracts,* Sections 295 and 315. These citations leave no doubt that the type of conduct to which reference was made was, as held by the Court of Appeals on the first appeal herein, such "That it must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job" (346 F. 2d at p. 484, Appendix to Petition p. 7a).

Petitioner fails to note that *in not a single case cited as being in conflict with the decision herein was the unsafe condition created by the stevedore,* as was the situation here.

Petitioner's analysis of the decision of the Court of Appeals for the Fourth Circuit in *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.,* 311 F. 2d 663, gives a completely distorted view of the case by eliminating the controlling factual elements upon which the decision in that case was based. In that case the jury found that the presence of hydrogen cyanide gas in the cargo

loaded at a prior port was such a latent or hidden danger as is not usually encountered by an expert and experienced ship ceiler, but was a condition of which the shipowner knew, or by the exercise of ordinary care should have known, and was not such a condition as the ship ceiling company by the exercise of reasonable care should have discovered. It was on the basis, and only on the basis of these specific findings of the jury, that the Court in that case sustained a verdict in favor of the ship ceiling company on the claim for indemnity. The principles applied by the Court in that case are in precise accord with the principles governing indemnity defeating conduct stated with a wealth of supporting authority in *Hugev* v. *Dampskisaktieselskabet International,* 170 F. Supp. 601, 610-611, aff'd *sub nom. Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International* (C. A. 9), 274 F. 2d 875, cert. den. 363 U. S. 803, cited by this Court in *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U. S. 315, 323, footnote 9.

The other cases cited by Petitioner as being in conflict with the decisions of the Court of Appeals herein, viz., *Hudson Steamship Co.* v. *Colon,* 314 F. 2d 44 (C. A. 1); *Thompson* v. *Trent Maritime Co.,* 353 F. 2d 632 (C. A. 3); *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional,* 294 F. 2d 32 (C. A. 3); *Compania Anonima Venezolano de Navegacion* v. *Matthews,* 371 F. 2d 971 (C. A. 5); *Waterman Steamship Corporation* v. *David,* 353 F. 2d 660; *United States* v. *Harrison,* 245 F. 2d 911 (C. A. 9), all involve defects in the ship's hull or equipment where the stevedore was either given express assurance by the ship that the equipment was in a safe condition for use as in *Hudson, Hodgson* and *United States* v. *Harrison* or implied assurance thereof as in *Waterman,* or the shipowner neglected or refused to correct a condition which was its responsibility as in *Thompson* and *Compania Anonima.*

In all of these cases as in *Weyerhaeuser,* the question involved was whether the stevedore was liable in indemnity in continuing to work after a discovery of an unsafe con-

dition which had originally been created not by the stevedore but by the shipowner.

In the present case, we have on the contrary a condition of the longshoremen's work area created by instrumentalities provided by the stevedore, the effects of which were either known, or should have been known, to the stevedore, the testing of the harmful effects of which was a prescribed obligation imposed by the stevedore upon its supervisory personnel on board the ship, and for the prevention of which harmful effects the stevedore maintained preventive means in the way of portable blowers which, according to its prescribed procedures, were always and without variation supposed to have been placed at hatches every time a hilo was employed in a hold.

To argue that a belated request by subordinate employees to a mate to put on the ship's forced ventilating system within 15 minutes prior to the time that plaintiff was overcome by the carbon monoxide fumes and after they must already have had injurious effects, creates an issue of fact as to whether the shipowner prevented or hindered the stevedore in the performance of its warranty of workmanlike service, is manifestly unsound. If a stevedore could so escape the effect of a clear breach of its warranty, the warranty would be meaningless. It is submitted that as a matter of law, such evidence was insufficient to create a jury question whether the shipowner was chargeable with conduct precluding indemnity.

The contention that the decision of the Court of Appeals below is in conflict with its own earlier decision in *McNamara* v. *Weichsel Dampfschiffahrts AG Kiel, Germany*, 339 F. 2d 475, is completely fallacious. That case involved numerous fact issues as to whether or not the persons who were operating the winch, who were employees of the shipowner and had been borrowed by the stevedore, were incompetent for the performance of such service, and whether or not they were, in the performance of the service, acting

as the servants of the shipowner or of the stevedore, and also whether the accident was due to faults on their part or fault on the part of the chief mate of the ship who took over the giving of signals to the winchman from the stevedore's employee. All of these questions were sharply disputed as issues of fact. The Circuit Court reversed a verdict in favor of the shipowner against the stevedore because of error in the instructions to the jury. On the retrial, these fact issues were submitted to a jury and again resulted in a verdict in favor of the shipowner against the stevedore, although the shipowner's negligent conduct had on the first trial been held to be a proximate cause of the injury. The Court had no difficulty whatever in affirming the judgment in favor of the shipowner against the stevedore, holding that the shipowner's negligence did not preclude indemnity, citing *Italia Societa* and *Weyerhaeuser* (339 F. 2d 475, 478). That was the issue of law involved in that case, and the Court's ultimate decision thereon is entirely consistent with the decision below in the case *sub judice.*

Conclusion

What this petition really seeks, under false guises, is a review and relaxation by this Court of the law of maritime indemnity as consistently enunciated by this Court beginning with *Ryan* v. *Pan Atlantic S.S. Co.,* 350 U. S. 124 (1955), running through *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.,* 355 U. S. 563 (1958); *Crumady* v. *J. H. Fisser,* 358 U. S. 423 (1959); *Waterman S.S. Corp.* v. *Dugan & McNamara Inc.,* 364 U. S. 421 (1960) and culminating in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.,* 376 U. S. 315 (1965), upon the plea that the economic burden which has been placed upon stevedores by these decisions has driven the majority of stevedoring companies out of business, and "to leave surviving only those few who possess an infallible degree of expertise, or a willingness, backed by sufficient wealth, to become an insurer" (Petition, p. 24). This is sheer nonsense.

It is a known fact that it is the practice of the stevedoring industry to add insurance charges for workmen's compensation and legal liability insurance on to the charges which it imposes upon shipowners for its services. Ultimately, it is the shipowner and not the stevedore who pays the mounting insurance costs. The consolidation of stevedore companies into a fewer number of large companies possessing greater competence and efficiency and the means to take advantage of developing technological improvements has been common within the past generation to all industries. With particular reference to the maritime industry in the Port of New York, the consolidation into fewer, larger and more efficient companies has occurred not only in the stevedoring industry, but also in the towboat industry and lighterage industry. When, during the tugboat strike of 1946, President Truman requisitioned all tugboats in New York harbor, the order of requisition went out to approximately 100 companies. There are today in New York harbor about seven towboat companies of any responsible size, and only about a handfull of independents. In the lighterage industry, there are left remaining out of a score of companies probably less than a half dozen.

To state that the consolidation of the stevedore industry in the Port of New York from a large number of small independent companies into a fewer number of large responsible companies is, as said by the Petitioner, "responsive to the death knell tocsin of the judiciary" is as lacking in good taste as it is in accuracy.

The petition should be denied.

Respectfully submitted,

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